to be in restraint of trade, a restriction must not be so wide as to affect the public injuriously, and no wider than is necessary for the protection of the prior owner.[14] The former requisite is unsatisfied if the restraint is total,[15] and even a partial restraint must be merely ancillary to a principal contract.[16] Whether a restraint is wider than is necessary to constitute a fair protection to the promisee must always be a question on the particular facts of each case.[17] A single contract determining the re-sale price of chattels and not dealing with all such chattels in commerce is upheld.[18] On the other hand, a system of contracts controlling the price of sales and re-sales has generally been held invalid.[19] For any benefit to the original vendor is manifestly but an incident to the chief result, the benefit to his vendees and sub-vendees by the elimination of competition between them.[20] A recent California case takes a contrary view. *Ghirardelli Co.* v. *Hunsicker*, 128 Pac. 1041 (Cal.). The decision is curious in that the court, after finding that the contract was ancillary and that the provision resulted only in a partial restraint of the whole output of the commodity, reached its conclusion without any consideration of the question whether the plaintiff was being afforded more protection than he fairly required.

ADMISSIBILITY OF LEARNED TREATISES AS EVIDENCE. — A recent case discusses but declines to follow Professor Wigmore's suggestion [1] that medical books and other learned treatises be admitted as evidence of the opinions which they contain. *Denver City Tramway Co.* v. *Gawley*, 129 Pac. 258 (Colo., Ct. App.). In admitting the writings of an expert

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utilized are subject to the same rules as ordinary chattels. Dr. Miles Medical Co. *v.* Park & Sons Co., 220 U. S. 373; Grogan *v.* Chaffee, 156 Cal. 611, 105 Pac. 745. *Contra*, Wells & Richardson Co. *v.* Abraham, 146 Fed. 190. Such an owner is allowed to protect himself against betrayal of his secret by one who has received it through confidential relations. Chadwick *v.* Covill, 156 Mass. 190, 23 N. E. 1068; Jarvis *v.* Knapp, 12 Fed. 34; Harrison *v.* Glucose Co., 116 Fed. 304. So also he is protected against breach of contract when the secret is communicated in confidence and under restrictions as to its use.

[14] Horner *v.* Graves, 7 Bing. 735. See Gibbs *v.* Baltimore Gas Co., 130 U. S. 396, 409.

[15] *Cf.* Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211; Swift & Co. *v.* United States, 196 U. S. 395. This is true even though the public might not have much general interest in the restraint. Montague & Co. *v.* Lowry, 193 U. S. 38.

[16] Hodge *v.* Sloan, 107 N. Y. 244, 17 N. E. 355; Navigation Co. *v.* Winsor, 20 Wall. (U. S.) 64.

[17] Horner *v.* Graves, *supra*. See Nordenfeldt *v.* Maxim Nordenfeldt Co., [1894] A. C. 535, 567.

[18] Elliman *v.* Covington, 2 Ch. D. 275; Garst *v.* Harris, 177 Mass. 72.

[19] Dr. Miles Medical Co. *v.* Park & Sons Co., *supra*; Park & Sons Co. *v.* Hartman, *supra*. See 24 HARV. L. REV. 268. *Contra*, Walsh *v.* Dwight, 58 N. Y. 91; Park & Sons Co. *v.* National Wholesale Druggists, 175 N. Y. 1, 67 N. Y. S. 136. See 24 HARV. L. REV. 244.

[20] See Park & Sons Co. *v.* Hartman, 153 Fed. 24, 45. The cases are sometimes supported on the ground that the effect of the agreement is not different from that of a contract between competing dealers fixing prices. Such contracts are universally held invalid. People *v.* Sheldon, 139 N. Y. 251; Craft *v.* McConoughy, 79 Ill. 346.

[1] 26 AM. L. REV. 390; WIGMORE, EVIDENCE, §§ 1690 *et seq.*

who is not present, the suggested reform would create a new exception to the hearsay rule. Although the doctrines and exceptions which make up the law of evidence have developed separately and along strict lines, yet today the principles underlying the admission of testimony are firmly fixed in the practice of the court room. It does not seem possible or wise to change these rules by judicial legislation unless the change merely involves the application of principles already recognized. It is therefore first necessary to determine whether the theories underlying the admission in somewhat analogous cases of documentary evidence can be properly extended to that of learned treatises. The admission of almanacs,[2] mortality tables,[3] and some similar records is based on one of two grounds. The courts sometimes take judicial notice of the fact so stated;[4] the records would then be merely reminders. When this theory is not applicable, it is said that the court takes judicial notice of the authenticity of the documents as evidence of the facts in issue.[5] This seems merely to state a reason for making at least a technical exception to the hearsay rule. The justification seems founded on the almost mechanical precision attainable in recording such matters as the mathematical averages of mortality tables, by a process of reasoning similar to that which recognizes the accuracy of photography to be sufficient to admit pictures as proof of the object reproduced.[6] Obviously photographic certainty does not obtain in the case of learned treatises. Another analogous exception to the hearsay rule admits evidence of reputation in cases where the fact to be proved, present or past, is of general or public interest.[7] When the matter is very far in the past, resort may be had to histories as evidence of present reputation of past facts.[8] The qualification for such books, however, is not the wisdom of the writer, but a sufficiently wide circulation to make the views contained fairly typical of contemporary public opinion. Furthermore, none of the cases discussed relate to opinion evidence. The need for the safeguard of cross-examination, which is one of the chief reasons for the hearsay rule, is peculiarly fundamental in the admission of expert opinion. It is indispensable in elucidating the expert's meaning and in testing his competency. It is also necessary in order to show on what the opinion is premised, so as to eliminate evidence based on facts not proved to the satisfaction of the jurors.[9] It seems clear,

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[2] See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 291 *et seq.*; Munshower *v.* State, 55 Md. 24.

[3] See WIGMORE, EVIDENCE, § 1698, n. 1.

[4] See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 306.

[5] See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 306; Ennis *v.* Smith, 14 How. (U. S.) 400, 426.

[6] See Udderzook *v.* Commonwealth, 76 Pa. St. 340.

[7] See WIGMORE, EVIDENCE, § 1586.

[8] See WIGMORE, EVIDENCE, § 1597; Morris *v.* Lessee of Harmer's Heirs, 7 Pet. (U. S.) 554, 558.

[9] It should be observed that some expert testimony might be admitted by one of the exceptions to the hearsay rule, as when made in the discharge of some regular duty or business, without the opportunity of cross-examination. But see Bradford *v.* Cunard Steamship Co., 147 Mass. 55, 57, 16 N. E. 719, 720. This, however, illustrates the inevitable logical consequences of the exceptions themselves, rather than any relaxation of the courts toward the admissibility of hearsay opinion evidence.

therefore, that the proposed exception would violate the principles of the law of evidence.

But it is urged that the practical advantages warrant a departure by act of the legislature from the principles of the past. It is said that time and money will be saved. But first it must be determined what books shall be admitted. Obviously none but specialists can pass upon the standing of specialized writings. Whereas at present experts wrangle as to the correct opinion, the proposed innovation would merely shift the ground of their contention to the correctness of the author. And when one side has proved the qualifications of a learned treatise, nothing is to prevent the party opponent from producing an equally learned work by a dissenting author. Nor does the argument appear sound that the admission of this evidence will make more readily available to the court the latest results of scientific research. A real expert is presumably posted on the latest authorities, and has the additional advantage of being able to act as interpreter. The opinion itself may be based on a treatise, and the actual exclusion of the particular volume deprives the court of little advantage. The strongest practical argument for the exception is perhaps that learned treatises are free from the prejudice so frequently seen in experts. But any advantage seems to be more than counterbalanced by the danger that the way may be opened to confusing the jury either by deliberate mystification or innocent misapprehension in the use of technical excerpts. In short, no advantage seems to suggest itself sufficient to justify an innovation so unwarranted by the present rules of evidence and so liable to practical abuse in the court room.[10]

THE EFFECT OF A PARDON. — While, as has been often said, a pardon is granted of grace and not of right,[1] it must be assumed in considering its effect that the reason for granting a pardon to-day is not generally the mere personal favor of the pardoning power, but a recognition that the rigid rules of law as to crimes and punishments may fail to effect justice in individual cases. Thus later developments may make it appear that one legally found guilty was in fact innocent, or, if technically guilty, at least morally innocent. In other cases the peculiar physical condition of the guilty man or extenuating circumstances connected with the crime may justify a relief from further punishment.[2] Pardons,

[10] The rule suggested by Professor Wigmore seems to have been adopted by judicial legislation in Alabama. Stoudenmeier *v.* Wilson, 29 Ala. 558, 565; Merkle *v.* State, 37 Ala. 139, 141; Bales *v.* State, 63 Ala. 30, 38; Birmingham, etc. Co. *v.* Moore, 148 Ala. 115, 125, 42 So. 1024, 1028. The Alabama rule appears to have originated from an Iowa case, Bowman *v.* Woods, 1 G. Greene (Ia.) 441, 444. But the doctrine no longer obtains in that state. Bixby *v.* The Omaha, etc. Co., 105 Ia. 293, 75 N. W. 182; Union Pacific R. Co. *v.* Yates, 79 Fed. 584, 588. For jurisdictions where statutes allow the admission of books to prove facts of general notoriety and interest, see WIGMORE, EVIDENCE, § 1693, n. 1, 2.

[1] See Roberts *v.* State, 160 N. Y. 217, 222, 54 N. E. 678, 679; 3 INST. 233.

[2] Sometimes public policy requires that a large body of offenders shall be no longer considered criminals, as, for instance, after the Civil War when a general amnesty was granted to those who had joined in the rebellion.